In the United States

Circuit Court of Appeals

For the Ninth Circuit

Joseph E. Wise, et al.,
Appellants,

vs.

Cornelius C. Watts, the Bouldins, et al.,
Appellees.

No. 2719.

Supplemental Brief of Appellants Wise, as to the Validity of the Sheriff's Sale Under Which the Interest of D. W. Bouldin Was Sold.

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Defendants Bouldin in their brief assert that in a suit against an administrator the waiver of recourse against other property of the estate is jurisdictional, and that without such waiver the court has no power to order the sale of attached property.

When claim is rejected by the administrator the statute provides that suit can be brought.

Sec. 1115 of the Revised Statutes of Arizona of 1887, specifically provides that when a claim is rejected the holder may bring suit thereon. The section is as follows:

> "Sec. 1115. When a claim is rejected, either by the executor or administrator, or the probate judge, the holder must bring suit in the proper court against the executor or administrator, within three months after date of its rejection, if it be then due, or within two months after it becomes due. Otherwise the claim is forever barred."

Sec. 1117 provides, that no holder of any claim against an estate shall maintain any action thereon until it is first presented; except that a mortgage or lien may be enforced if recourse against other property of the estate is expressly waived in the complaint. The section is as follows:

> "Sec. 1117. No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator, except in the following case: An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint; but no counsel fees shall be recovered in such action unless such claim be so presented."

The courts of California have held, under statutes

identical with the statutes just quoted, after presenting his claim the lienholder can bring suit to foreclose the same without waiving recourse against any other property of the estate. Moran v. Gardemeyer, 82 Cal. 96; 23 Pac. 6. In that case the court said:

> "Counsel contend that, having filed his claim under section 1497, Code Civil Pro., a mortgagee is under the present constitution and statutes, thereafter barred of the right to proceed by foreclosure, unless the right is given by Sec. 1500, and that under that section it is only given where he declines to file his claim under section 1497, and elects to look to the mortgaged property alone, for the recovery of his money ,and expressly waives all claim against the estate for deficiency and all claim for counsel fees; also claiming that when his claim is once filed and allowed he is amply protected by the provisions of Sec. 1569. We cannot concede, as counsel contend, that this is now an open question in this court. The point made was directly decided against the position taken by appellants here, in Society v. Conlin, 67 Cal. 180, 7 Pac. 477. This case was followed by Society v. Hutchinson, 68 Cal. 52, 8 Pac. 627, and Wise v. Williams, 72 Cal. 544, 14 P. 204."

Moran v. Gardemeyer, 82 Cal. 96; 23 Pac. 6.

Again, Sec. 1119 Revised Statutes of Arizona of 1887 provides:

"Sec. 1119. If an action is pending against the decedent at the time of his death, the plaintiff must in like manner present his claim to the executor or administrator for allowance or rejection, authenticated as required in other cases; and no recovery shall be had in the action unless proof be made of the presentations required."

This section is identical with Sec. 1502 of Code Civil Procedure of California. And the California courts have held that proof of the simple presentation of plaintiff's claim is all that is required to enable him to have the action revived against the executor.

"Under Code Civ. Pro., 1502, providing that upon the death of a defendant, plaintiff must present his claim to the executor or administrator for allowance, and no recovery shall be had in the action unless proof be made of the presentation required, proof of the simple presentation of plaintiff's claim is all that is required to enable him to have the action revived against the executor."

Gregory v. Clargorough, 62 Pac. 72, 129 Cal. 475;

Falkner v. Hendy, 107 Cal. 49; 40 Pac. 21, 386;

Society v. Wackenrender, 99 Cal. 507, 34 P. 219;

Frazier v. Murphy, 133 Cal. 91, 65 Pac. 326;

Vol. I Church Pro., p. 764; also Par. 466, p. 683,

The judgment of the district court of Arizona, in the case of Ireland and King v. Bouldin and Goldschmidt, administrator, specifically recites that the plaintiffs had presented their claim to the administrator and that it had been rejected. Tr. p. 468.

As the claim of Ireland and King had been presented to the administrator; as it had been rejected, and as that fact appears in the judgment itself, the case was revived against the administrator, and the court had jurisdiction to render the judgment which it did.

In the case of Wartman v. Pecka, 68 Pac. 534; 8 Ariz. 11-15, on page 11, the Arizona court specifically held that the court does have jurisdiction to foreclose attached property, and that the action shall not abate by death.

> "The attachment proceeding becomes, therefore, an integral part of the action; and the provisions of paragraph 725 providing that an action shall not abate by the death or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue, apply, and embrace the foreclosure of the lien, as well as the cause of action."

Now only is the allegation of waiver against recourse against other property of the estate not required, when the claim has been presented to the administrator; but

it would be a mistake to insert such an allegation, for the holder of the claim **is** entitled to recourse against other property of the estate, in the event the amount realized from the sale of the mortgaged or attached property is insufficient to pay his debt.

Sheriff's Certificate of Sale

We note that counsel for the Bouldins in their brief, on pp. 62 to 64 thereof, copy the Sheriff's Return of Sale, and cite the same as being found on p. 513 of the record. But on p. 513 of the transcript of record is the Sheriff's Certificate of Sale, Defendants Wise Exhibit 22; and not the Sheriff's Return of Sale, which is part of Wise Exhibit 19, on pp. 472-476 of the transcript.

The Sheriff's Certificate of Sale is different from his Return; in this certificate he recites the execution and what he was commanded to do thereby, and then refers to the execution itself, and then recites:

> "I have levied on and this day sold at public auction, according to the statute in such cases made and provided, to Wilbur H. King, who was the highest and best bidder, for the sum of Two Thousand Dollars ($2,000) lawful money of the United States, which was the whole price bid for the same, the real estate particularly described as follows, to-wit; (Here comes description) and the said real estate was sold in one parcel and that the price for each distinct lot and parcel was as follows: $2000, and that the said real estate is subject to redemption in lawful money of the United

States, pursuant to the statute in such cases made and provided. Given under my hand this 31st day of July, 1898. Robert N. Leatherwood, Sheriff. By W. H. Taylor, Under Sheriff. Tr. pp. 513-515.

This Certificate of Sale shows that a valid sale was made, and the mistake in reference by counsel for Bouldin was an inadvertence, to which it is necessary to call attention.

Now in regard to the return of sale, set forth on pp. 472-479, it will be observed that the published notice of sale was part of the Sheriff's Return. The notice of sale is on pp. 474-476 of the Transcript. Being a part of the return, this notice of sale must be construed in connection therewith. This we have done in our main brief on pp. 207 to 211 thereof, to which we here call attention.

In further support of our statement that under the judgment foreclosing the attachment lien and the order of sale thereon, no levy was necessary to be made by the sheriff, and therefore, and that his recital of levy is mere surplusage, we refer to the case of Wartman v. Pecka, 8 Ariz. 8-15, also cited by counsel for the Bouldins, in which that court said:

> "Under our statute no execution need be levied upon property held under attachment, and directed by the court to be sold in satisfaction of the judgment, for the order of the court is sufficient warrant to the sheriff, or other officer, to sell. In this

respect the proceeding is analagous to the sale of property under judgment foreclosing a mechanics' lien."

The statement of counsel for Bouldin, in their brief, "that the certificate of sale is the only evidence which we have of what was actually sold, and it shows that the sheriff sold the interest of Leo Goldschmidt, administrator of the estate of David W. Bouldin, and not the interest which he had been ordered to sell, namely, the interest attached on March 14, 1893," is not supported by the certificate of sale nor by the return of the sheriff; for each shows that the sheriff recites he was ordered to sell the property described in the order of sale; and the order of sale itself is a certified copy of the judgment, which is made a part of the sheriff's return. This property described in the order of sale is what he sold. This order of sale is to be found on pp. 472 to 479 of the Transcript.

The Sheriff's Deed

The first deed executed by the sheriff was on January 16, 1899, by Lyman W. Wakefield, Sheriff, Tr. 515-520. This deed was defective, and thereafter, and on the 30th day of September, 1914, the court ordered John Nelson, the then sheriff of Pima County, to execute a new deed. Tr. 489. Nelson executed the curative deed. Tr. p. 520.

The validity of the sale did not depend upon the execution of a deed by the sheriff.

In the case of Donnebaum v. Tinsley, 54 Tex. 363-366, the court said:

> "But the title of a purchaser of land at sheriff's sale does not depend upon the deed. It rests upon a valid judgment, levy and execution sale and the payment of the money. The sheriff's deed is not essential."

> "A sheriff's deed defective to pass title, is nevertheless admissible in evidence as conducing to show that the purchaser at the sale had acquired the equitable title to the land."

> Miller v. Alexander, 8 Tex. 36-46.

> "A purchaser of real property at a judicial sale or execution sale, takes all the rights of the parties whose interests are sold and hence may sue to quiet title."

> Copper Belle Mining Co. v. Gleason, 134 Pac. 285, 14 Ariz. 548.

In the case of Oliver v. Dougherty, 8 Ariz. 65; 68 Pac. 553, the Supreme Court of Arizona held that the purchaser of property at a forecloseure sale, receiving a sheriff's certificate but no deed, has such an interest in the property that it can be sold on execution, and that the purchaser, as assignee, can maintain an action thereon to quiet title. The above case is cited with approval in Van Vranken vs. Granite County, 90 Pac. (Mont.) 164, wherein the court says:

"We are of the opinion that possession under an equitable title is sufficient to support the astion" (to quiet title).

"The execution of the deed after the time for redemption had expired was a purely ministerial act on the part of the officer, and could have been compelled by the purchaser, or those claiming under him, at any time in a proper proceeding for that purpose. Until the sale had been set aside, a certificate of purchase would be as fully protected as though the legal title had been conveyed by deed made in pursuance of the statute."

Diamon v. Turner, 11 Wash. 189, 39 Pac. 379.

The Sheriff can execute a deed at any time after redemption.

The Revised Statutes of Arizona of 1913, in regard to the sheriff executing a deed on execution sale, provides as follows:

"At the expiration of the period of six months, if no notice of intention to redeem be given by any lien holder or creditor . . . . . and not sooner, the sheriff shall execute and deliver a deed to the property sold to the purchaser at the sale, or in case redemption is made by a redemptioner, then to the last redemptioner redeeming said property."

R. S. A .of 1913, §1380.

Same as R. S. A., 1901, §2579.

This is substantially the same as the provision in Section 22 of Act No. 20, approved March 18, 1899, which Act repealed Chapter I, Title 26 of the Revised Statutes of Arizona of 1887, entitled Executions. The provision of the Act of 1889 on the subject of sheriff's deed is as follows:

> "If no redemption be made within six months after the sale, the purchaser, or his assignee, is entitled to a conveyance."
>
> Acts of the Legislative Session of Arizona, 1899, Act. No. 20, Sec. 22, p. 44.

The present statute of Arizona further provides that the successor in office of the sheriff who made the sale, can execute the deed, if the purchaser become entitled thereto after the expiration of the term of the officer making the sale. The statute is as follows:

> "Whenever the term of office for which any officer has been elected or appointed shall terminate by operation of law, by death, resignation or removal, leaving unperformed any duty imposed by law, it shall be the duty of the successor in office to do and perform all acts and complete all unfinished business which was commenced by his predecessor in office, and for this purpose it is made the duty of the incoming sheriff to execute deeds of conveyance of real estate on sales made by his predecessor on foreclosure or execution, and to perform every other act which was uncompleted

or unfinished by his predecessor at the time his term of office expired."

R. S. A. 1913, §2527.

Same as R. S. A. 1901, §1076.

In the case of McCauley v. Jones, 86 Pac. 422, 34 Mont. 375, the court held that any sheriff succeeding the sheriff who made the first deed, was the successor of such officer. In that case, the court said:

> "Under section 1237 of the Code of Civil Procedure, it is the duty of the sheriff who made the sale, if he still be in office, but if not, then of his successor, to make the deed. Any sheriff succeeding the sheriff who made the first deed was the successor of such officer."

In that case the sheriff sold the property at sheriff's sale on the 24th day of March, 1900. On January 19, 1905, a new deed was made by the then sheriff, John Q. Quinn, to the purchaser, being five years after the sale. In that case the court further said:

> "The law does not require the purchaser of a mortgage foreclosure sale to apply for the deed immediately upon the expiration of the year."

> "The term (successor) applies to any future occupant of an office held by a public officer just as he is the successor to any incumbents who preceded him, no matter when."

State v. O'Leary, 64 Minn. 207.

The sheriff's deed can be introduced in evidence although executed after suit has been commenced.

In the case of Reeve v. North Carolina Land and Timber Co., 141 Fed. 821-834; 72 C. C. A. 287, Mr. Justice Lurton, speaking for the court, on this particular point said:

> "The statute prescribes no time within which a deed may be made by the successor of a sheriff or other officer who made a sale, and we see no reason for denying the power in this case." Sheafer v. Mitchell, 109 Tenn. 203, 71 S. W. 86, et seq.

> "Finally, it is said that a complainant cannot acquire a title pending his suit and bring it forward by supplemental bill. That is not this case. The complainants had an imperfect but inchoate title when they brought this suit. They simply perfected the existing title by obtaining a valid sheriff's deed in place of an invalid one which attempted to convey the same title. It was not error to permit a curative deed to be thus brought forward. Gibson's Suits in Equity, 650; 2 Daniel Pl. & Pr. (4th Ed.) 1515 and 1516, and notes; Mutter v. Chanvel, 5 Rus. 42; Sadler v. Lovett, 1 Moll. 162; Jaques v. Hall, 3 Gray (Mass) 194."

Reve v. North Carolina Land & Timber Co., 141 Fed. 834; 72 C. C. A. 287.

"The mere omission of the purchaser to demand a deed from the sheriff at the expiration of the period of redemption, will not ordinarily defeat his absolute and continuous right to a conveyance after that time, where the sale has been properly made and the writ duly returned, and a proper record thereof made."

Wright v. Dick, 19 N. E. 306, 116 Ind. 538.

In Jones v. Webb, 59 S. W., 858, (Ky.) the land of Bowling and Jones was sold under execution. The sheriff's deed purported to convey the entire property as the property of Bowling. The sale was made in February, 1877. On March 12, 1894, the then Sheriff made a second deed to the assignees of the purchaser, conveying to them the land as the property of both Bowling and Jones.

The court said in that case:

"Although the deed made by the sheriff in 1877, by mistake, which it seems was overlooked by all the parties at the time, conveyed only Bowling's title to the land, this mistake did not divest Ireland and Pollock of their equitable title to the other half of the land, which they then held by virtue of the levy and sale under the execution and the assignment to them of the purchaser's bid. They were the equitable owners of the entire tract, with the legal title to only one half of it, as matters then stood, and were entitled by proper proceeding to

have the deed corrected. In Freeman on Execution §332, it is said 'Certainly a purchaser at execution sale is entitled to a conveyance in pursuance of and commensurate with his purchase. If a deed is given to him which for any cause is void or incorrect, he is entitled to another, one which shall be valid in form and conformable to the facts in the case.' The fact that the amended deed was made to Pollock and the heirs of Ireland is immaterial."

The Equities of the Bouldins.

The defendants Bouldin have filed their cross-bill seeking to have the cloud of this judgment sale removed from their alleged title.

They seek equitable relief, but they do not offer to do equity by tendering the amount due upon the judgment, which is a good and valid lien on the property they claim, even if the sale made by the sheriff was void.

Leo Goldschmidt is still the administrator of the estate of David W. Bouldin; that estate has not been closed; it is still pending as an unclosed estate in the Superior Court of Pima County, (Tr. p. 511-512).

The right and interest of the heirs of David W. Bouldin seek in this present action, so far as this judgment of the estate, after the debts are paid. The administrator is not a party to this acion. What the heirs of Bouldin seek in his present acion, so far as this judgment and sale is concerned, is to have the sheriff's deed set aside; to have the sheriff's sale decreed to be void, and

the property sold to be decreed to be owned by them; although administration is still pending upon the estate, and the debt of their ancestor has been decreed to be a valid lien on that estate, and they do not even offer to do equity, by tendering the amount of this lien.

We submit that they are in no position to ask equitable relief in this action, for he who seeks equity must do equity.

We therefore submit that the judgment is valid and not subject to collateral attack. The sheriff's sale was valid, and the State court had jurisdiction to order the curative deed to be made by the sheriff of Pima County, who is an officer of that court, and the successor in office of the sheriff who made the sale; and therefore, that order of the court is not subject to collateral attack. And we further submit that as the administration of the estate of Bouldin is still open and pending; as Goldschmidt is still the administrator; the heirs of Bouldin, in no event, are entitled to equitable relief, because they have not offered to do equity by tendering the amount of money which was adjudged by the District Court of the Territory to be a lien on the interest owned by their ancestor.

Respectfully submitted,

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